



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 20, 2004

Ms. Stephanie Bergeron  
Director, Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2004-0423

Dear Ms. Bergeron:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194467.

The Texas Commission on Environmental Quality (the "commission") received a request for (1) internal communications relating to a named entity for a specified time interval; (2) information relating to six other named entities for a specified time interval; (3) communications between employees of the commission and two named public officials; and (4) information relating to commission policy. You inform us that the commission will release some of the requested information. You claim, however, that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the information you submitted.<sup>2</sup>

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<sup>1</sup>This decision addresses both your arguments and those that were separately submitted by the Office of General Counsel (the "OGC"). We note that you also initially raised section 552.103, but have submitted no arguments in support of that exception. Accordingly, we do not address the applicability of section 552.103 to any of the submitted information. See Gov't Code §§ 552.007, .301(e)(1)(A), .302.

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OGC claims the attorney-client privilege under section 552.107(1) with regard to three documents submitted by the OGC as Attachment C.<sup>3</sup> The OGC informs us that two of these documents are memoranda that were prepared by the OGC for the members of the commission in connection with their public meetings. The OGC states that the third document is a partially completed memorandum prepared by the OGC in anticipation of a public meeting. The OGC states that the purpose of these documents is to provide legal

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<sup>3</sup>The OGC also asserts the attorney-client privilege with regard to these documents under section 552.101 of the Government Code. We note, however, that section 552.101 does not encompass the attorney-client privilege. *See* Open Records Decision No. 676 at 1-3 (2002).

advice to the members of the commission with regard to matters pending before them.<sup>4</sup> Having considered the OGC's arguments, we conclude that the responsive information contained in the two documents that we have marked is excepted from disclosure under section 552.107(1). The OGC does not indicate, however, and it is not otherwise clear to this office, that the third document constitutes or documents a communication between or among privileged parties. *See* Open Records Decision No. 676 at 7 (2002) (governmental body must demonstrate that information claimed to be protected by attorney-client privilege constitutes or documents communication). We therefore conclude that the commission may not withhold any responsive information contained in the third document under section 552.107(1).

Next, we address the commission's claims under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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<sup>4</sup>The OGC notes that the documents in question pertain to matters that are beyond the scope of this request for information. This decision does not address the public availability of any information that is not encompassed by this request.

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The OGC seeks to withhold the third document submitted by the OGC under section 552.111. The OGC does not demonstrate, however, that any responsive portion of that document consists of advice, recommendations, opinions, or other material that reflect the commission's policymaking processes. We therefore conclude that the commission may not withhold any responsive information contained in the OGC's third document under section 552.111. You raise section 552.111 with regard to the information that you submitted as Enclosure No. 4. Having considered your arguments and reviewed that information, we conclude that the commission may withhold the information that we have marked in Enclosure No. 4 under section 552.111.

The commission also raises section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You seek to withhold the information that you submitted as Enclosure No. 3, Tab 6, under section 552.108(a)(1). You have not demonstrated, however, that section 552.108 is applicable to that information. *See* Open Records Decision No. 199 (1978) (agency whose function is essentially regulatory in nature is not law enforcement agency for purposes of statutory predecessor). We therefore conclude that the commission may not withhold any of the information at Enclosure No. 3, Tab 6, under section 552.108 of the Government Code.

We note, however, that the Tab 6 information contains what appears to be a Texas license plate number. Section 552.130(a)(2) of the Government Code excepts from public disclosure information that relates to "a motor vehicle title or registration issued by an agency of this state[.]" If the license plate number that we have marked relates to a Texas motor vehicle registration, then it is excepted from disclosure under section 552.130.

In summary, (1) the commission may withhold the responsive portions of the two marked documents submitted by the OGC under section 552.107; (2) the commission also may withhold the marked information that is excepted from disclosure under section 552.111; and (3) the commission must withhold a Texas license plate number under section 552.130. The commission must release the rest of the submitted information that is responsive to this request.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

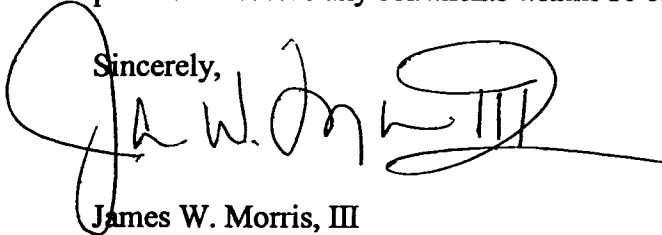
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a large, stylized initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 194467

Enc: Submitted documents

c: Mr. Arik K. Short  
Vinson & Elkins, L.L.P.  
The Terrace 7  
2801 Via Fortuna, Suite 100  
Austin, Texas 78746  
(w/o enclosures)